NATIONAL MARINE FISHERIES SERVICE, ALASKA REGION
OFFICE OF ADMINISTRATIVE APPEALS

In re Application of	)	Appeal No. 00-0012
	)	
RONALD J. TENNISON,	)	ORDER DENYING APPELLANT'S
F/V DESTINY,	)	MOTION FOR RECONSIDERATION
Appellant	)	
	)	July 11, 2003
	)	

On April 5, 2002, this Office issued a Decision, which affirmed the initial administrative determination (IAD) issued by RAM that denied (1) Mr. Tennison's application for a License Limitation Program (LLP) groundfish license, based on alleged Pacific cod harvests for crab bait; and (2) Mr. Tennison's application for an LLP crab license, endorsed for Aleutian Islands (AI) brown king, AI red king crab, and Pribilof red and blue king crab. Both applications were based on the fishing history of Mr. Tennison's vessel, the F/V DESTINY. The Decision gave Mr. Tennison until April 15, 2002 to file a motion for reconsideration. Mr. Tennison timely filed a motion for reconsideration on April 23, 2002, after we granted his request for an extension of time.

The standard for granting a motion for reconsideration is whether the Appellant has raised material matters of fact or law that were overlooked or misunderstood by the Appeals Officer in the Decision. Mr. Tennison's motion for reconsideration does not raise material matters of fact or law that were overlooked or misunderstood by the Appeals Officer in the Decision. Therefore, Mr. Tennison's motion for reconsideration is DENIED. The reasons for the denial of the motion are discussed below.

Denial of Mr. Tennison's LLP groundfish application

In the Decision, we concluded that Mr. Tennison did not qualify for an LLP groundfish license because the F/V DESTINY did not make the required number of documented harvests during the endorsement qualification period (EQP).[1] In his appeal, Mr. Tennison argued that he met the EQP requirement because he had caught Pacific cod from the F/V DESTINY during the EQP and used it for crab bait. We rejected Mr. Tennison's argument for two reasons.

First, Mr. Tennison did not produce a state fish ticket, federal catch report, or other "valid documentation" for a Pacific cod harvest made by the vessel during the EQP, as required by federal regulation 50 C.F.R. § 679.4(k)(4). Mr. Tennison argues on reconsideration, as he did in his appeal, that he is not required to produce documentation of the harvests because both NMFS and the State of Alaska had exempted the harvests from the reporting and recordkeeping requirements of the Federal and state commercial fishing regulations.

[1] 50 C.F.R. § 679.4(k)(4)(ii).

Federal regulation 50 C.F.R. § 679.4(k)(4) specifically requires a state fish ticket, federal catch report, or other "valid documentation" to establish a documented harvest of groundfish, for purposes of qualifying an applicant for an LLP groundfish license. This requirement was adopted by the North Pacific Fishery Management Council (Council), and approved by NMFS, after the F/V DESTINY made the alleged harvests of Pacific cod for crab bait during the EQP. The Council and NMFS could have provided language in the LLP that exempts Pacific cod harvests for crab bait from the "documented" harvest EQP requirement, but they did not do so.

In several decisions,[2] we have ruled that an Appeals Officer is bound by the language of a duly promulgated regulation, and that the authority to change, modify, or rule unconstitutional a duly promulgated regulation lies not within this Office but within the jurisdiction of the Federal court system. Therefore, the Appeals Officer did not misconstrue the applicable law by concluding that Mr. Tennison had to produce a state fish ticket, federal catch report, or other "valid documentation" for the alleged harvests of Pacific cod (used exclusively aboard the F/V DESTINY) for crab bait.

Mr. Tennison argues in the alternative that he has "valid documentation" for the alleged Pacific cod harvests, based on two crew member statements that the F/V DESTINY used ten crab pots to catch Pacific cod for crab bait during the EQP. The crew statements were not submitted on appeal but only during reconsideration, and therefore they cannot be considered now. But even if we were to reopen the record and accept the crew statements into evidence, we would have to conclude that they do not constitute "valid documentation" because the language of the LLP regulations specifically requires the documentation to consist of "the amount of license limitation groundfish harvested, the groundfish reporting area in which the license limitation groundfish was harvested, the vessel and gear type used to harvest the license limitation groundfish, and the date of harvesting, landing, or reporting." [50 C.F.R. § 679.4(k)(4)] The Appeals Officer did not err in concluding that Mr. Tennison did not produce "valid documentation" for the alleged Pacific cod harvests for crab bait, since *no* documentation of the cod harvests was submitted during the appeal.

The second reason for rejecting Mr. Tennison's argument was that the alleged Pacific cod harvests for crab bait by the F/V DESTINY did not result from commercial fishing. Mr. Tennison argues on reconsideration, as he did on appeal, that the alleged Pacific cod harvests did result from commercial fishing because he "traded" the use of 10 crab pots for 10 codfish pots to harvest the fish.

The Magnuson-Stevens Fishery Conservation and Management Act, which governs the LLP, defines "commercial fishing" as fishing in which the fish harvested, either in whole or in part, are intended to enter commerce or enter commerce through sale, barter, or trade.[3]

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[2] *See, e.g.,* George M. Ramos, Decision on Review, April 25, 1995, at 4; and Little Ann, Inc., Appeal No. 01-0022, July 10, 2002.

[3] *See* 16 U.S.C. § 1802.

In the Decision, we concluded that the alleged Pacific cod harvests for crab bait could not be considered "commercial fishing" of groundfish because the fish were not intended to be sold, bartered, or traded, but were used exclusively as crab bait aboard the F/V DESTINY.[4] In doing so, we relied on the precedent of our decision in Appeal of Paula J. Brogdon, in which we said:

> Using one's own catch for bait on one's own vessel cannot reasonably be construed as "sale, barter or trade" as envisioned in the Magnuson-Stevens Act. The cod never changed hands, and ownership of the cod was never transferred to another party. Therefore, it cannot be said that the cod were intended to be, or actually were sold, bartered, or traded.[5]

Mr. Tennison does not dispute in his Motion for Reconsideration that he kept the cod that he harvested with the crab pots for himself, as crab bait aboard the F/V DESTINY. The cod never changed ownership. Therefore, Mr. Tennison's argument that he "traded" the cod to himself, in exchange for the crab that he believes he would have caught if he had refrained from cod fishing, – i.e., the cost of lost opportunity – cannot be construed as a commercial transaction under the Magnuson-Stevens Act. As a result, the Decision did not misconstrue the applicable law in concluding that the alleged harvests of Pacific cod were not the result of commercial fishing.

Mr. Tennison argues that it is unfair for NMFS to consider cod that was sold or harvested as by-catch to be a "documented harvest" of groundfish, but not cod that was specifically "targeted" for harvest with crab pots "tagged" for cod. As we said in Appeal of Willard S. Ferris, in response to the same argument,

> Admittedly, at first glance this may seem unfair. The issue, however, is not whether the Pacific cod were harvested as a targeted species or as bycatch; the question is whether the Pacific cod were harvested commercially. If the Pacific cod were intended to enter commerce, or actually entered commerce, "through sale, barter or trade," and they were lawfully harvested and properly documented, they can be credited as documented harvests for purposes of LLP groundfish license or endorsement qualification. Refusing to credit the noncommercial harvest of Pacific cod for LLP groundfish license or endorsement qualification is not unfairly discriminatory.[6]

Finally, our refusal to give Mr. Tennison LLP credit for undocumented Pacific cod harvests does not prevent him from continuing to harvest groundfish as crab bait for use on his own vessel. He does not need an LLP groundfish license or Pacific cod endorsement if he harvests

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[4]Decision, at 5.

[5]*See* Paula B. Brogdon, Appeal No. 00-0011, February 26, 2002, at 5.

[6]Appeal No. 01-0004, January 18, 2002, at 3.

the cod in crab pot gear during open crab season, does not transfer or sell the cod, and uses it solely as crab bait aboard his own vessel. Such harvests are exempt from recordkeeping and reporting requirements.[7] Our refusal simply keeps Mr. Tennison from gaining entry into the BSAI groundfish fisheries under the LLP on the basis of undocumented, noncommercial harvests of Pacific cod.

Denial of Mr. Tennison's LLP crab application, with endorsements for AI brown king crab, AI red king crab and Pribilof red and blue king crab.

In the Decision, we concluded that Mr. Tennison's LLP crab license could not be endorsed for AI brown king crab, AI red king crab, or Pribilof red or blue king crab, based on a "documented harvest" of the crab or an "unavoidable circumstance" (that prevented the documented harvest of the crab) because the F/V DESTINY did not make a documented harvest of any AI brown king crab, AI red king crab, or Pribilof red or blue king crab during the period January 1, 1992 through December 31, 1994, which encompasses the endorsements qualification periods for those fisheries.

On reconsideration, Mr. Tennison argues that the EQP for the Pribilof blue king crab fishery should include September 1995, because that was the first time that the fishery had been open since the fishery's closure during years 1993 and 1994. The LLP regulations require the F/V DESTINY to have made at least one "documented harvest" of Pribilof red or blue king crab in 1993 or 1994 to endorse Mr. Tennison's LLP crab license for Pribilof red and blue king crab.[8]

While the Pribilof blue king fishery was closed during 1993 and 1994, the Pribilof red king fishery was open during those years. Therefore, Mr. Tennison could have satisfied the EQP requirement for Pribilof red and blue king crab by harvesting Pribilof red king crab, but he did not do so. Mr. Tennison questions the policy decision to grant a combined Pribilof blue and red king endorsement, based only on a red king harvest, when the Pribilof blue and red king fisheries are "two separate fisheries." Even so, this Office is bound by the language of the LLP regulations, and we do not have authority to change or modify a duly promulgated regulation.[9] The language of the LLP regulations clearly requires at least one documented harvest of Pribilof red *or* blue king crab during 1993 or 1994 to endorse an LLP crab license for Pribilof red *and* blue king crab.[10] Therefore, the Appeals Officer did not misconstrue the applicable law in concluding that Mr. Tennison's LLP crab license could not be endorsed for Pribilof red and blue king crab.

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[7] 50 C.F.R. §679.5(a)(1)(iii)(B).

[8] 50 C.F.R. § 679.4(k)(ii)(A).

[9] *See* note 2.

[10] *See* note 6.

Mr. Tennison claims on reconsideration that an "unavoidable circumstance" prevented the F/V DESTINY from satisfying the EQP requirement for a Pribilof red and blue king endorsement. To receive credit under the "unavoidable circumstances" exception, Mr. Tennison must establish that the F/V DESTINY made a documented harvest of Pribilof red or blue king crab after the claimed unavoidable circumstance but before June 17, 1995.[11]

Mr. Tennison objects to the documented harvest requirement before June 17, 1995, for several reasons. First, he states that if he made a Pribilof blue or red king harvest before June 17, 1995, he would meet the EQP requirement and would not need the "unavoidable circumstances" provision. Second, he states this requirement is unfair because he believes that he meets the other requirements in the unavoidable circumstances regulation, based on his participation in the Pribilof red and blue king crab fishery in September 1995. Third, Mr. Tennison argues that this requirement is particularly unfair to an applicant for a Pribilof blue and red king endorsement because the Pribilof blue king crab fishery was not open until September 1995. He states that the applicant for this endorsement should receive the entire calendar year of 1995 – not simply until June 17, 1995 – to make this last harvest of Pribilof blue king under the unavoidable circumstances regulation.

Again, as stated above, this Office is bound by the language of the LLP regulations, and it does not have authority to change or modify a duly promulgated regulation.[12] Federal regulation 50 C.F.R. § 679.4(k)(iv)(E) explicitly requires at least one documented harvest after the claimed unavoidable circumstance, but before June 17, 1995. Therefore, the Appeals Officer did not misconstrue the applicable law in concluding that Mr. Tennison's LLP crab license cannot be endorsed for Pribilof red and blue king crab, based on an "unavoidable circumstance."

Lack of public notice of LLP

Mr. Tennison claims that he and other local fishermen in Kodiak, Alaska, were not given adequate public notice of the Council meetings that discussed the Council's recommendations for the LLP. Even if that is true, I do not have authority to invalidate a duly promulgated regulation. I note that the proposed LLP regulations were published in the Federal Register, and that the public was given the requisite opportunity to comment on the regulations before the final rule of the LLP took effect, or to challenge the regulations in court.[13]

ORDER

[11] 50 C.P.R. § 679.4(k)(8)(iv)(E).

[12] *See* note 5.

[13] *See* 62 Fed. Reg. 43,866 (Aug. 15, 1997) for the proposed regulations, and 63 Fed. Reg. 52,642 (October 1, 1998) for the final rule of the LLP.

Mr. Tennison's motion for reconsideration is DENIED. The Decision in this appeal takes effect on August 11, 2003, unless by that date the Regional Administrator orders review of the Decision.

Randall J. Moen
Appeals Officer